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No. 80-1943

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

FRANK GROOM KIRTZ, and MARY JANE KIRTZ,
Petitioners,

vs.

BLANTON WIGGIN, ERMA WIGGIN, ADVANCED INSTRUMENTS, INC., A.I. COMPANY, INC., a/k/a ADVANCED INSTRUMENTS, INC., and H-T-L INSTRUMENTS, INC.,
Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO Petition For A Writ Of Certiorari To The United States Court of Appeals For The Eighth Circuit

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QUESTIONS PRESENTED

Petitioners itemize two questions submitted to this Court. In substance, disregarding their allegations concerning the conduct of the Court of Appeals (Petition for Certiorari, pp. 4, 5, and 10), these will be restated as follows:

1. Did petitioners' Fourth Amended Complaint, further amended by interlineation, fail to state a claim for relief.

2. Whether the Courts below properly made adjudications in favor of the respondents directing the dismissal of the complaint.

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STATUTES, REGULATIONS AND COURT RULES INVOLVED

15 U.S.C. §78j. Manipulative and deceptive devices

"It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange—

(a) To effect a short sale, or to use or employ any stop-loss order in connection with the purchase or sale, of any security registered on a national securities exchange, in

contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

June 6, 1934, c. 404 §10, 48 Stat. 891"

17 C.F.R. Section 240.10b-5

"It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,

(a) To employ any device, scheme, or artifice to defraud,

(b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances, under which they were made, not misleading, or

(c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

(Sec. 10; 48 Stat. 891; 15 U.S.C. 78j)

[13 FR 8183, Dec. 22, 1948, as amended at 16 FR 7928, Aug. 11, 1951]"

Rules of the United States District Court for the Eastern District of Missouri, Rule 7. Motions

"(A) Oral Argument or Testimony.

Motions in general shall be forthwith submitted and determined upon motion papers and briefs hereinafter referred to, without oral argument, as soon after filing and submission of briefs as time of the Court permits. The Court may in its discretion order oral argument on any motion."

STATEMENT OF THE CASE

Petitioners' action is an offshoot of litigation first commenced in state court in 1966. The present litigation was filed in the District Court in May, 1976 (Supp. A-2).[1]

The District Court dismissed Petitioners' second amended complaint on procedural grounds (Supp. A-3). On appeal the Eighth Circuit reversed in part and affirmed in part. It held that the counts it reinstated:

"***are subject to the Wiggin's motion to dismiss for failure to state a claim upon which relief can be granted, made as a part of their original motion to dismiss. The district court has not ruled on that motion, and we have not considered the question." (R. App. B - A-9)

The background of this case is best described by the Court of Appeals in its first decision in this case entered December 30, 1977, at footnote 1 (R. App. B - A-3), as follows:

---

[1]References to Petitioners' Appendix will be indicated as "A- ", to Petitioners' Supplemental Appendix as "Supp. A- " and references to Respondents' Appendix will be indicated as "R. App. ".

"The present action is one in a long line of legal disputes arising from the Kirtzes' relationship with Med-Science. In *Gieselmann* v. *Stegeman,* 443 S.W. 2d 127 (Mo. 1969), the Supreme Court of Missouri found Frank Kirtz, then a director of the corporation, guilty of fraud and breach of fiduciary duty in issuing and transferring certain shares to himself. In *Gieselmann* v. *Stegeman,* 470 S.W. 2d 522 (Mo. 1971), Kirtz was held liable for receivership expenses incurred by the corporation. These two cases culminated in the disbarment of Kirtz by the Supreme Court of Missouri. *In Re. Kirtz,* 494 S.W. 2d 324 (Mo. 1973). Subsequently, the Kirtzes, as stockholders dissenting from a merger, brought an action in Missouri state court tc recover the fair value of their shares. The Circuit Court for the City of St. Louis found their 22,500 shares to be worth $2.76 per share and awarded them $62,100. *Kirtz* v. *Advanced Instruments, Inc.,* No. 41220-F (Nov. 12, 1976), *appeal pending* No. 39265 (Mo. Ct. App.)" [reported at 581 S.W. 2d 868].

After remand, more amendments to their Complaint were made by Petitioners. The District Court then dismissed Petitioners' claims as set forth in the Fourth Amended Complaint, as amended by interlineation on January 15, 1980 (Supp. A-16). The Court held, among other things that any alleged acts of Respondents which reduced the value of stock owned by Petitioners were known to them at the time of the valuation case in state court, they had the right and obligation to present same at that time, and are now precluded from again litigating this issue of valuation (Supp. A-6, 7).

The Court of Appeals affirmed the order of the District Court on February 5, 1981 on the basis of the lower court's opinion reported as Kirtz v. Wiggin, 483 F. Supp. 148 (D.E.D. Mo. 1980) (A-2).

Rehearing was denied by the Court on February 24, 1981 (Supp. A-1).

ARGUMENT

I. Petitioners Allege That As Minority Shareholders They Were Treated Unfairly By Majority Shareholders In Connection With A Merger. Because Petitioners Had And Exercised The Exclusive Remedy Of Appraisal Of The Fair Value Of Their Shares As Of The Date Of The Merger Under Missouri Corporation Law, Their Claims Are Barred.

Petitioners state that the only question before the Court of Appeals "was whether the petitioners had stated a cause of action upon which relief can be granted" under Rule 10b-5 (17 C.F.R. §240.10b-5) and 15 U.S.C. §78j. (Petition p. 4).

Petitioners filed suit in the state court seeking appraisal of the full value of their shares under the provisions of Missouri law. After trial, petitioners appealed the judgment which was affirmed (Supp. A-3, 4).

Petitioners' claims are barred by the decision of this Court in *Santa Fe Industries, Inc.* v. *Green,* 430 U.S. 462, 97 S.Ct. 1292, 51 L. Ed. 2d 480 (1977). That case teaches that there is no violation of Section 10(b) of the Securities Exchange Act (15 U.S.C. §78j) and Rule 10b-5 where a complaint is that a minority stockholder was treated unfairly by a fiduciary in connection with a merger if the plaintiff had the right to invoke a state court remedy to obtain fair value of his shares following such a merger. As is the case here, plaintiffs in *Santa Fe* were minority shareholders who claimed that they were going to receive grossly inadequate price for their shares following the merger, as the result of a fraudulent appraisal of the shares. This Court disallowed that claim.

All of the alleged "wrongs" attributed to respondents were known to petitioners well before the trial of the state valuation case, and were presented by them in that proceeding (Supp. A-6). Under *Santa Fe Industries, Inc.* v. *Green, supra,* petitioners obviously fail to state a cause of action.

II. There Is No Conflict Among The Circuits As To Petitioners' Failure To State A Claim.

Most of the allegations contained in petitioners' complaint are based upon the contention that items appearing in the financial statements and corporate minutes furnished petitioners prior to the trial of the state valuation case, do not characterize the various transactions as petitioners would have them characterized. In other words, they say that the various persons, accountants and corporate entities preparing the documents should have denoted the transactions as "fraudulent" and disclosed what the petitioners speculate was the true motivation of said transactions. Under the securities laws and Rule 10b-5, petitioners are not entitled to have such a characterization. Its absence does not constitute unlawful misrepresentation or nondisclosure, and petitioners have no federal cause of action. *Golub* v. *P.P.D. Corp.*, 576 F.2d 759 (8th Cir. 1978).

To like effect are *Biesenbach* v. *Guenther*, 588 F.2d 400 (8th Cir. 1978); *Popkin* v. *Bishop*, 464 F.2d 714 (2nd Cir. 1972); *Alabama Farm Bureau Mutual Casualty Co., Inc.* v. *American Fidelity Life Insurance Co., etc. et al*, 606 F.2d 602 (5th Cir. 1979); and *Vaughn* v. *Teledyne, Inc.*, 628 F.2d 1214 (9th Cir. 1980).

III. Petitioners Claim Of Denial Of Due Process Is Patently Invalid.

As outlined by the United States Court of Appeals for the Eighth Circuit, petitioners have availed themselves of a long series of litigation in the state courts (R. App. B - A-3).

They have been to the Court of Appeals twice on the present case.

Originally the District Court dismissed their second amended complaint herein, without prejudice, on procedural grounds (R. App. B - A-2).

The Eighth Circuit considered that complaint in detail in its unpublished opinion of December 30, 1977, set forth in respondents' Appendix B.

Again, in the District Court, petitioners continued amending their complaint, finally ending up with a fourth amended complaint, amended by interlineation.

Respondents filed their motion to dismiss for failure to state a claim and for summary judgment. Briefs were filed by both petitioners and respondents. Also before the District Court was the full record in the state valuation case, including the trial transcript (Supp. A.-4). In the discretion of the District Court, oral argument was not held as per Local Rule 7 of the United States District Court for the Eastern District of Missouri.

The care and consideration devoted to the decision of the District Court in dismissing petitioners' complaint is apparent from its Memorandum Opinion (Supp. App.).

On appeal, the record before the District Court, including the trial transcript of the state valuation case, and affidavits in support of the motion to dismiss were certified to the appellate court.

For petitioners to contend a denial of due process or a departure from the accepted and usual course of judicial proceeding flies in the face of the decision of the Eighth Circuit Court of Appeals which held:

> "After oral argument and careful consideration of the records and briefs, we affirm the judgment of the district court on the basis of its well-reasoned opinion. *Kirtz* v. *Wiggin,* 483 F.Supp. 148 (D.E.D. Mo. 1980)." (A-2)

CONCLUSION

For all the foregoing reasons, it is respectfully submitted that the petition for writ of certiorari to the court below should be denied.

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APPENDIX

APPENDIX A

JUDGMENT
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

September Term, 1977

No. 77-1351

Frank Groom Kirtz, Mary Jane Kirtz,
Appellants,

vs.

Blanton Wiggin, Erma Wiggin,
Appellees.

Appeal from the United States District Court
for the Eastern District of Missouri

This cause came on to be heard on the original designated record of the United States District Court for the Eastern District of Missouri and briefs of the respective parties without oral argument.

On Consideration Whereof, it is now here ordered and adjudged by this Court that the said District Court's dismissal of counts I, III, and XII in this cause be and the same is hereby affirmed.

And it is further ordered by this Court that the remaining counts be and are hereby reinstated in this cause for proceedings consistent with this Court's opinion.

December 30, 1977

A true copy.
Attest: Robert C. Tucker
Clerk, U.S. Court of Appeals, 8th Circuit. January 27, 1978

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 77-1351

Frank Groom Kirtz and Mary Jane Kirtz,
Appellants,

v.

Blanton Wiggin and Erma Wiggin,
Appellees.

Appeal from the United States District Court
for the Eastern District of Missouri.

Submitted: December 24, 1977

Filed: December 30, 1977

Before BRIGHT, STEPHENSON, and HENLEY, Circuit Judges.

PER CURIAM.

The district court dismissed this action, without prejudice, because of the failure of Frank Groom Kirtz and Mary Jane Kirtz, proceeding *pro se,* to cure various deficiencies in their complaint. On this appeal by the Kirtzes, we reinstate the complaint in part.

I.

The Kirtzes, residents of Missouri, were the sole minority stockholders of Med-Science Electronics, Inc., a Missouri corporation, until August 1973, when that company was merged into Advance Instruments, Inc., a Massachusetts corporation.[1] Blanton and Erma Wiggin, residents of Masachusetts, controlled the majority of the stock of both companies and were the directors and officers of Med-Science. The Kirtzes allege that the Wiggins, through various self-dealing transactions and improper accounting devices, diverted corporate funds and fraudulently reduced the book value of Med-Science so that Advance Instruments could purchase the company at less than its true net worth. The Kirtzes, *pro se,* brought this diversity action to remedy the injuries they allegedly suffered because of the Wiggins' actions.

The complaint states thirteen claims. Although it is excessively verbose and rambling, for the most part the complaint is intelligible, with some exceptions noted below.

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[1] The present action is one in a long line of legal disputes arising from the Kirtzes' relationship with Med-Science. In *Gieselmann* v. *Stegeman,* 443 S.W.2d 127 (Mo. 1969), the Supreme Court of Missouri found Frank Kirtz, then a director of the corporation, guilty of fraud and breach of fiduciary duty in issuing and transferring certain shares to himself. In *Gieselmann* v. *Stegeman,* 470 S.W.2d 522 (Mo. 1971), Kirtz was held liable for receivership expenses incurred by the corporation. These two cases culminated in the disbarment of Kirtz by the Supreme Court of Missouri. *In re Kirtz,* 494 S.W.2d 324 (Mo. 1973). Subsequently, the Kirtzes, as stockholders dissenting from a merger, brought an action in Missouri state court to recover the fair value of their shares. The Circuit Court for the City of St. Louis found their 22,500 shares to be worth $2.76 per share and awarded them $62,100. *Kirtz* v. *Advance Instruments, Inc.,* No. 41220-F (Nov. 12, 1976), *appeal pending,* No. 39265 (Mo. Ct. App.).

Count I contains general allegation that the Wiggins, through fraud, conversion, and self-dealing transactions, and in violation of their fiduciary duties, conspired to reduce the assets of Med-Science for the sole purpose of defeating the Kirtzes' rights. The Kirtzes ask for actual damages and for punitive damages of $50,000.

Count II alleges that the Wiggins refused to supply the Kirtzes with financial reports or to allow a firm called Valuation Counsellors, Inc. to inspect the corporate records on behalf of the Kirtzes. The Kirtzes ask for $16,700 actual damages for expenses incurred in hiring Valuation Counsellors and four law firms in their effort to obtain the records necessary to ascertain the value of their Med-Science stock. They further ask for $50,000 punitive damages.

Count III refers to a controversy over the ownership of 2,500 shares of Med-Science stock. The question whether these shares are owned by the Kirtzes or are treasury shares is apparently pending in the action in the Missouri state court. *See* note 1 *supra.* These allegations, however, are so vague and ungrammatical that we cannot discover an intelligible claim in count III.

Count IV alleges that the Wiggins diverted $40,000 of Med-Science assets to themselves by setting up a fictitious account called "Notes Payable to Shareholders" on the corporation's books and then issuing checks to themselves in satisfaction of the notes. These transactions, according to the Kirtzes, reduced the net worth of the corporation by $40,000 and injured the Kirtzes by $11,000, representing their twenty-eight percent share of the $40,000. They ask $11,000 actual damages and $50,000 punitive damages.

Count V alleges that the Wiggins authorized the purchase of 220 shares of H-T-L Instruments, Inc., which subsequently became worthless, and that this transaction constitutes a "self-

dealing" diversion of $15,000 of Med-Science funds. The Kirtzes ask $4,200 actual damages and $50,000 punitive damages.

Count VI alleges that the Wiggins authorized the payment of $5,000 to the widow of a former Med-Science employee. The Kirtzes ask $1,300 actual damages and $50,000 punitive damages.

Count VII alleges that the Wiggins, in a "self-dealing" diversion of corporate funds, obtained an automobile for their personal use paid for by Med-Science. The Kirtzes ask $5,600 actual damages.

Count VIII alleges that the 1973 Med-Science balance sheet fictitiously listed $21,655 as "doubtful accounts" for the sole purpose of reducing the book value of the company. The Kirtzes ask $7,048 actual damages.

Count IX alleges that the 1973 Med-Science financial statement listed $42,885 in fictitious "professional fees" for the sole purpose of reducing the net value of the company. The Kirtzes ask $12,040 actual damages and $50,000 punitive damages.

Count X allages that $140,443 in commissions paid to Advance Instruments in 1973 constituted a self-dealing diversion of corporate funds. The Kirtzes ask $39,200 actual damages and $50,000 punitive damages.

Count XI alleges that the Wiggins, in an abuse of process, willfully and maliciously authorized Med-Science to maintain a wrongful garnishment action against Frank Groom Kirtz, causing him to incur $59,584.20 actual damages.

Count XII contains a general allegation of fraud, breach of fiduciary duty, and diversion of corporate assets. The Kirtzes ask $100,000 punitive damages.

Count XIII alleges that the merger of Med-Science with Advance Instruments was a self-dealing transaction, that Med-Science was purchased at less than its true net worth, injuring

the Kirtzes, and that the Wiggins frustrated the Kirtzes' efforts to ascertain the true value of their Med-Science stock. The Kirtzes further allege that the Wiggins, by incorporating a new Massachusetts corporation with the name Med-Science Electronics, Inc., misappropriated the valuable name of the Missouri corporation. They ask $150,000 punitive damages.

Upon the filing of the initial complaint, the Wiggins filed a motion to dismiss on grounds that the complaint failed to comply with the Federal Rules of Civil Procedure in the following ways: failure to state the grounds of jurisdiction required by Rule 8(a); failure to join Med-Science, Advance Instruments, and its successor, A. I. Company, as indispensable parties under Rule 19; failure to comply with Rule 23, as the complaint contained a class action allegation; failure to state a claim upon which relief can be granted; failure to comply with the Rule 23.1 regarding stockholders' derivative actions. The Wiggins requested, in the alternative, that various "immaterial and scandalous" allegations be struck, that each claim be restated as separate counts as required by Rule 10(b), and that the fraud claims be stated with greater particularity as required by Rule 9(b).

The Kirtzes then filed an amended complaint in which they merely removed the class action allegation and recited allegations appropriate for diversity jurisdiction.

In response to another motion to dismiss, the district court, on December 3, 1976, ordered the Kirtzes to file an amended complaint in accordance with Rules 9(b), 10(b), 12(e), 19(c), 23, and 23.1.

The Kirtzes filed a second amended complaint in which the only change was the relabeling of the paragraphs as "counts."

The Wiggins again moved to dismiss, and the district court, on February 8, 1977, entered an order and judgment dismissing the action, without prejudice, on the ground that the Kirtzes failed to comply with the court's December 3 order.

The Kirtzes then filed a motion to reconsider the judgment dismissing the complaint. The court, in an order dated February 22, 1977, overruled that motion. The Kirtzes then brought this appeal.

II.

After examining the Kirtzes' second complaint, we conclude that the district court erred in dismissing the action as a whole, and we reinstate most, but not all, of the counts. The district court dismissed the action for failure to comply with Rules 9(b), 10(b), 12(e), 19(c), 23, and 23.1[2] We will examine the complaint in light of the requirements of those rules.

Rule 10(b) requires each claim to be stated in a separate paragraph. Although the Kirtzes could have presented their complaint in a more direct and organized fashion, the complaint generally does set forth each claim in a separate paragraph.

Rule 12(e) permits the court to strike a pleading that is so vague or ambiguous that the adverse party cannot frame a responsive pleading. Unless they are mere repetitions of the

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[2] The Kirtzes erroneously believe that the court dismissed the complaint for failure to state a claim. Although the February 22nd order referred to Rule 12(b)(6), the district court did not rely on that rule in dismissing the action. The Wiggins have made a motion to dismiss under Rule 12(b)(6), but the district court has not yet expressly ruled on that motion. Therefore, the question whether the complaint states a claim is not before us on this appeal.

We consider this appeal to be a challenge to the order and judgment of February 8, 1977, dismissing the complaint for failure to comply with the rules listed in the order of December 3, 1976. The judgment of February 8 is a final decision appealable under 28 U.S.C. § 1291 (1970), the time for appeal running from the entry of the February 22 order. Fed. R. App. P. 4(a). Despite the Kirtzes' misunderstanding of the grounds for the dismissal of their action, the Wiggins have briefed, and we review, all grounds on which the district court dismissed the complaint.

charges contained in the other counts, counts I and XII are too vague to permit the defendants to respond to them. The district court correctly dismissed those counts. In addition, count III was properly dismissed as vague and ambiguous. As for the other counts, we conclude that they contain sufficient information to withstand a Rule 12(e) motion.

Because the Kirtzes have deleted their class action allegation, Rule 23 is an inappropriate basis for dismissal.

Rule 9(b) requires that allegations of fraud be stated with particularity. We have already concluded that counts I, III, and XII were properly dismissed on grounds of vagueness. As for the other counts, the Kirtzes describe the alleged fraudulent actions with sufficient particularity to withstand a Rule 9(b) motion. We make no judgment on whether the allegations of fraud make out claims upon which relief can be granted.

Rule 23.1 prescribes the requirements for a shareholder's derivative action. In a shareholder's derivative action, the corporation usually is an indispensable party. Rule 19 requires that such parties be joined in the action or that the plaintiff state why the party is not joined. The district court apparently assumed that the complaint was a shareholder's derivative action despite the Kirtzes' protestations that it was not. We conclude that counts II, XI, and XIII describe conduct by which the defendants allegedly injured the plaintiffs directly. Those contentions are not derivative claims. Counts IV, V, VI, VII, VII, IX, and X could be construed as derivative claims, but each contains allegations of fraud and violations of fiduciary duty that might also be the basis for a direct action under Missouri law:

> Stockholders may maintain an action on an individual basis, as distinguished from a derivative action, against directors, officers, or others for the redress of wrongs constituting a direct fraud upon them, as in the case where wrongdoers by fraud have seized control of the corporation from the complaining stockholders. * * * Another rule

> aids [plaintiff], namely, that which gives to a stockholder to whom an erring director or officer owes a special fiduciary duty the right to maintain an individual action. [*Gieselmann* v. *Stegeman,* 443 S.W.2d 127, 131 (Mo. 1969).]

On their face, those counts purport to be direct, not derivative actions. Moreover, the Kirtzes expressly stated in their memorandum in opposition to the first motion to dismiss that their claims are not derivative. The district court therefore erred in dismissing the complaint for failure to comply with Rules 19 and 23.1. We are expressing no opinion, however, on whether these counts, construed as direct actions, state any claims upon which relief can be granted.

We affirm the district court's dismissal of counts I, III, and XII, and we order reinstatement of the remaining counts. All the reinstated counts are subject to the Wiggins' motion to dismiss for failure to state a claim upon which relief can be granted, made as part of their original motion to dismiss. The district court has not yet ruled on that motion,[3] and we have not considered the question.

III.

We add a caveat. The plaintiffs, who are proceeding *pro se,* should not be judged by the strict standards of attorneys who are admitted into practice before the federal courts. Although plaintiff Frank Groom Kirtz is a disbarred attorney, the pleadings demonstrate that whatever legal skills he possesses do not lie within the realm of federal pleading and practice. The court should allow the Kirtzes some lee-way in stating their claims.

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[3] *See* note 2 *supra.*

On the other hand, litigants who proceed *pro se* are subject to the same rules of procedure and evidence as other litigants. *Hutter Northern Trust* v. *Door County Chamber of Commerce,* 467 F.2d 1075, 1079 (7th Cir. 1972); *Mazique* v. *Mazique,* 356 F.2d 801, 805 (D.C. Cir), *cert. denied,* 384 U.S. 981 (1966); *Carrigan* v. *California State Legislature,* 263 F.2d 560, 564 (9th Cir.), *cert. denied,* 359 U.S. 980 (1959). Moreover, a party proceeding *pro se* is not entitled to waste the court's time with claims totally lacking any legal bases. The Kirtzes' claims, as articulated in their complaint, rest precariously on the outer fringes of cognizable legal theories. The record strongly suggests that they lack the legal skills required to pursue this litigation. Although the Kirtzes have the right to proceed *pro se,* they would be well advised to obtain and follow the advice of legal counsel on both procedural matters and the merits of their claims.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

[Not to be published.]